NOTES

Summary Judgment in the Federal Courts

Summary judgment procedure was first authorized for the Federal District Courts in the Rules of Civil Procedure promulgated by the Supreme Court effective September 16, 1938 as Rule 56.[1] Previously, under the Equity Rules, there was no such thing as a summary judgment.[2] The new procedure authorized the grant of summary judgment at the instance of either plaintiff, defendant, or third-party defendant on a "claim, counterclaim, or cross-claim or (suit) to obtain a declaratory judgment," and in passing upon the motion, the pleadings, admissions, depositions, and affidavits may be considered.[3]

Save for several early attempts in Kentucky, South Carolina, and Virginia,[4] no common-law jurisdiction had an effective summary judgment procedure until the English Summary Procedure on Bills of Exchange Act of 1855,[5] which authorized summary judgment in actions upon negotiable instruments. In the Judicature Act of 1873 the remedy was extended to include six different types of civil actions,[6] which resulting provision was the prototype of many of the present state summary judgment statutes. While the coverage of the state rules is not within the scope of this Note, it is appropriate to observe that in many cases the remedy is still more or less restricted to the types of actions enumerated in the English Rules;[7] there are also additional limitations: *e. g.*

1. RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS, Rule 56, pursuant to the Act of June 19, 1934, c. 651, § 1, 48 STAT. 1064 28 U.S.C. §§ 723b, 723c (Supp. 1949). Before this time, in actions at law the Conformity Act, c. 255, 17 STAT. 197 (1872), required the local state procedure to be followed. District Courts in states having summary judgment procedures in effect had available such a remedy.

2. Dempsey v. Pink, 92 F.2d 572 (2d Cir. 1937); *cert. denied*, 303 U.S. 648 (1938).

3. For a lucid discussion of the new federal procedure, see Ilsen, *Recent Cases and New Developments in Federal Procedure*, 16 ST. JOHN'S L. REV. 1, 42 (1941).

4. Millar, *Three American Ventures in Summary Civil Procedure*, 38 YALE L.J. 193 (1928).

5. 18 & 19 VICT. c. 67 (1855).

6. Actions to recover a debt or liquidated demand, on a 1) contract, express or implied, 2) bond, 3) statute, 4) guaranty, 5) trust; and 6) actions for recovery of land by a landlord against a tenant. *Cf.* RULES OF THE SUPREME COURT, ORDER III, RULE 6; ORDER XIV, RULE 1, ANNUAL PRACTICE 15 *et seq.*, 172 *et seq.* (1943). See Clark and Samenow, *The Summary Judgment*, 38 YALE L.J. 423 (1928).

7. *E.g.*, CAL. CODE CIVIL PROC. ANN. § 437c (1941); CONN. PRAC. BOOK, RULES FOR THE TRIAL COURT §§ 52-57 (1934); DEL. REV. CODE c. 128, § 4648 (1935); ILL. STAT. ANN. c. 110, § 181 (Smith-Hurd 1948); MICH. COMP. LAWS §§ 618.9-618.15 (1948); N.Y. RULES CIV. PRAC., RULE 113 (Thompson 1939); R.I. GEN. LAWS tit. LVII, c. 524, § 1 (1938); VA. CODE ANN. § 8-721 (1950); W. VA. CODE ANN. § 5524 (1949). The following states have adopted the federal rules, however: ARIZ. CODE ANN. §§ 21-1210 to -1216 (1939); N.J. RULES CIV. PRAC. IN SUPER. COURT, RULE 3-56 (1948). The Wisconsin procedure is essentially as broad as Rule 56: WIS. STAT. § 270.635 (1947). For an excellent discussion of the various state provisions see Clark and Samenow, *The Summary Judgment*, 38 YALE L.J. 423 (1928); SHEINTAG, THE SUMMARY JUDGMENT (1941) (New York).

which of the parties may invoke the remedy,[8] and what matter may be considered by the trial court in passing upon the motion.[9] Federal Rule 56 was unique in that all limitations upon the type of action and upon the parties who may move for summary judgment were removed. As amended in 1948, any existing doubt as to the propriety of a "partial" or interlocutory summary judgment on the issue of liability alone has been removed,[10] and in its present state the letter of Rule 56 permits any party to any civil action to move for summary judgment at the appropriate time, and either a final summary disposition of the whole case or an interlocutory order disposing of those issues of fact about which there is no dispute will be made.[11]

That the fundamental stimulus to the establishment of a summary judgment procedure, and the granting of summary judgment in a particular case, is impatience with the dilatoriness of the legal process is apparent. That the opposing force is the reluctance of the judiciary to dispense with a complete trial in open court where there is any possibility of validity of the opponent's claim or defense is equally apparent. Though in some ways similar to the problem of removing a case from the trier of fact, the court in adjudicating a motion for summary judgment is not aided by the presence of witnesses subject to cross-examination,[11a] nor may he be sure that all evidence which might be introduced upon a full trial has been proffered. These and other similar influences have combined to restrict the operation of Rule 56 in practice, though on its face it is applicable to all types of actions.[12] The purpose of this Note is to investigate the effect of these restricting factors on the Federal summary judgment procedure, with particular attention to cases decided in the Third Circuit.

GENUINE ISSUE OF MATERIAL FACT

Rule 56 provides that summary judgment shall be granted for the moving party "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." While the phraseology of this test differs from those employed in the various state statutes,[13] it is probable that no difference in meaning was thereby intended.

8. The following states limit the remedy to plaintiffs: Connecticut, Delaware, Michigan, Rhode Island, Virginia, West Virginia.

9. Most of the state statutes limit evidentiary matter to affidavits. See statutes cited note 7 *supra*.

10. Rule 56(c), as amended.

11. Rule 56(d).

11a. To the extent that depositions are employed there has been opportunity for cross-examination.

12. Notes of Advisory Committee on Rules, Rule 56, 28 U.S.C.A. following § 723c (1941); *cf.* HOLTZOFF, THE NEW FEDERAL PROCEDURE AND THE COURTS 146 (1940).

13. *E.g.*, CAL. CODE CIV. PROC. ANN. § 437c (1941) (facts sufficient to present a triable issue of fact); CONN. PRAC. BOOK, RULES FOR THE TRIAL COURT, §§ 52-57

Allegations in Pleadings.—The summary judgment procedure provided by Rule 56 was designed primarily for a state of the proceeding in which there are apparent issues of fact raised by the pleadings. Otherwise, the motion would be superfluous since Rule 12 provides for the motion for judgment on the pleadings, which motion, being the survivor of the common law demurrer,[14] assumes the facts stated in the attacked pleading to be true.[15] The object of summary judgment is to pierce the veil of the allegations in the pleadings to determine whether there is really a bona fide fact issue to be tried. Accordingly, as a fundamental proposition it should be apparent that such allegations are not controlling in the determination of the propriety of summary judgment.[16]

Most of the earlier decisions in the Third Circuit have recognized this basic principle.[17] There seems to be no possibility of confusion where the answer and evidentiary matter[18] supporting the motion for summary judgment set forth new matter which by definition has not been contradicted by pleading or otherwise.[19] However, where the movant's evidentiary matter contradicts the allegations of his opponent's pleading, several recent decisions have indicated that the contrary allegations were ipso facto sufficient to raise a genuine issue of material fact.[20] These cases,

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(1934), ILL. STAT. ANN. c. 110, § 181 (Smith-Hurd 1948) (facts sufficient to entitle defendant to defend); N.Y. RULES CIV. PRAC., RULE 113 (Thompson 1939) (facts sufficient to entitle the opposing party to a trial of the issues); R.I. GEN. LAWS tit. LVII, c. 524, § 1 (1938) (substantial question of fact in dispute).

14. Notes of Advisory Committee on Rules, Rule 12, 28 U.S.C.A. following § 723c (1941).

15. *Cf.* SHEINTAG, *op. cit. supra* note 7.

16. See Commentary, *"Genuineness" of Issues on Summary Judgment,* 4 FED. RULES SERV. 940 (1941).

17. *E.g.,* Juniper Mills, Inc. v. Landenberger, 6 F.R.D. 463 (E.D. Pa. 1947); Arens v. Arens, 72 F. Supp. 432 (E.D. Pa. 1947); Norton v. Fairclough, 72 F. Supp. 308 (D.N.J. 1947); Dickheiser v. Pennsylvania R. Co., 5 F.R.D. 5 (E.D. Pa. 1945); Geller v. Transamerica Corp., 53 F. Supp. 625 (D.Del. 1943); Munoz v. Merchants Nat. Bank, 49 F. Supp. 588 (E.D. Pa. 1942); Allen v. Radio Corp. of America, 47 F. Supp. 244 (D.Del. 1942); Reid Gas Engine Co. v. Lewellyn, 42 F. Supp. 895 (W.D. Pa. 1942); Nieman v. Long, 31 F. Supp. 30 (E.D. Pa. 1939); *Cf.* Wilkinson v. Powell, 149 F.2d 335 (5th Cir. 1945); Engl v. Aetna Life Ins. Co., 139 F.2d 469 (2d Cir. 1943); Battista v. Horton, 128 F.2d 29 (D.C. Cir. 1942). *But cf.* Kent v. Hanlin, 35 F. Supp. 837 (E.D. Pa. 1940), which seems plainly erroneous.

18. At this point definition of terms is apposite. Throughout this Note the term *movant* refers to the party moving for summary judgment; *opponent,* to the party opposing the motion; *evidentiary matter,* the pleadings, affidavits, depositions, admissions, and answers to interrogatories introduced by the parties in support of or contra the motion.

19. Hurd v. Sheffield Steel Corp., 181 F.2d 269 (8th Cir. 1950); Miller v. Hoffman, 1 F.R.D. 290 (D.N.J. 1940). For purposes of joining issue to proceed to trial a denial of new matter in the answer is not necessary unless ordered by the court, RULES 7(a), 8(d). However this "constructive controversion" of new matter should not suffice to raise a genuine issue of material fact for purposes of summary judgment.

20. Leigh v. Barnhart, 10 F.R.D. 279 (D.N.J. 1950); *e.g.,* Postel v. Caruso, 86 F. Supp. 498 (D.N.J. 1949); Alamo Refining Co. v. Shell Development Co., 84 F. Supp. 325 (D.Del. 1949); Greenleaf v. Brunswick-Balke-Collender Corp., 79 F. Supp. 362 (E.D. Pa. 1947); *see* Harris v. Railway Exp. Agency, 178 F.2d 8 (10th Cir. 1949).

it is submitted, are patently erroneous. Their genesis seems to be a dictum in *Frederick Hart & Co. v. Recordgraph Co.*,[21] decided by the Third Circuit Court of Appeals in 1948, to the effect that affidavits may not be treated for the purposes of the motion to dismiss as "proof contrary to the well-pleaded facts in the complaint." While it is not clear from the *Hart* case whether the motion made by the defendant was to dismiss the complaint or for summary judgment,[22] it is submitted that the quoted language is inapplicable to the latter motion. The text writers and the overwhelming majority of decisions in all circuits support this view without qualification.[23]

Conflicting Evidentiary Matter.—However, if the opponent introduces affidavits, depositions, or other matter admissible under Rule 56, which present "material facts" at variance with the movant's evidentiary matter, the expected result is that summary judgment is precluded. That it was not the intent of the framers of the rules to substitute "trial by affidavit" for the more conventional form is apparent,[24] and the decisions abound with statements to the effect that the function of the court is limited to the ascertainment of the existence of an issue of material fact, and that it is not to try the issue of fact whose existence has been so ascertained.[25] This is not to say that in any instance the opponent is saved from a summary demise upon the mere introduction of an affidavit reiterating the allegations of his pleading,[26] or denying knowledge of the movant's case;[27] but the fact that the truth of his affidavits is less probable,[28] or that he has failed to introduce statements of disinterested parties,[29] or that his evidence

21. 169 F.2d 580, 581 (3d Cir. 1948).

22. The circuit court states that the trial court, 73 F. Supp. 146 (D. Del. 1947), decided only the motion to dismiss, and made no disposition of the motion for summary judgment. Nevertheless the case was finally decided as if a motion for summary judgment had been made, *i.e.*, the affidavits and interrogatories were considered to ascertain whether there was a genuine issue of material fact as to the threat of infringement.

23. Cases cited note 17 *supra;* Kennedy, *The Federal Summary Judgment Rule*, 13 BROOKLYN L. REV. 5 (1947); Clark, *Summary Judgment and a Proposed Rule of Court*, 25 J. AM. JUD. SOC. 20 (1941); Commentary, *"Genuineness" of Issues on Summary Judgment*, 4 FED. RULES SERV. 940 (1941); SHEINTAG, *op. cit. supra* 24; 3 MOORE, FEDERAL PRACTICE § 56.01 (1938).

24. FEDERAL RULES OF CIVIL PROCEDURE, PROCEEDINGS OF THE INSTITUTES AT WASHINGTON AND NEW YORK 176 (1938); PROCEEDINGS OF THE CLEVELAND INSTITUTE ON FEDERAL RULES 295 (1938); *cf.* SHEINTAG, *op. cit. supra* 40.

25. Sarnoff v. Ciaglia, 165 F.2d 167 (3d Cir. 1947); Toebelman v. Missouri-Kansas Pipe Line Co., 130 F.2d 1016 (3d Cir. 1942); Zig Zag Spring Co. v. Comfort Spring Corp., 89 F. Supp. 410 (D.N.J. 1950); Saddle R. Twp. v. Erie R. Co., 9 F.R.D. 252 (D.N.J. 1949); Norton v. Shotmeyer, 72 F. Supp. 188 (D.N.J. 1947); Snyder v. Dravo Corp., 6 F.R.D. 546 (W.D. Pa. 1947); Chemical Foundation v. Universal-Cyclops Steel Corp., 2 F.R.D. 283 (W.D. Pa. 1942); *cf.* Ramsouer v. Midland Valley R. Co., 133 F.2d 101 (8th Cir. 1943); Miller v. Miller, 122 F.2d 209 (D.C. Cir. 1941).

26. Hartmann v. Time, Inc., 166 F.2d 127 (3d Cir. 1948).

27. Herzog v. DesLauriers Steel Mould Co., 46 F. Supp. 211 (E.D. Pa. 1942).

28. Wise v. McCarty Aniline & Extract Co., 9 F.R.D. 170 (D.N.J. 1949).

29. Sarnoff v. Ciaglia, 165 F.2d 167 (3d Cir. 1947).

is equivocal[30] does not authorize the court to grant summary judgment against him.

Showing Necessary to Preclude Grant of Summary Judgment.—Implicit in the expression "genuine issue of material fact" is a problem common to all procedural devices for removing a case from the consideration of the trier of fact. That problem is the extent of evidentiary matter which must be shown by the opponent to preclude disposition of the case as a matter of law. The test for summary judgment seems to be analogous to that used when considering the motion for directed verdict, *i. e.,* whether enough evidence has been introduced by the opponent that the trier of fact might reasonably find for him,[31] and the decisions in this and other circuits have recognized the directed verdict test as being applicable to motions for summary judgment.[32] Similarly, the courts have been liberal in construing the opponent's evidentiary matter, resolving all inferential doubts in his favor.[33] The use of the directed verdict test has been criticized, however, because in effect the judge would be ruling on what he would do in a non-existent situation, *i. e.,* a full trial in open court.[34] The problem also remains as to whether strict rules of evidence apply to the parties' evidentiary matter, so that the "ruling is to be made on the record the parties have actually presented, not on one potentially possible," [35] or otherwise.

Matter Admissible on Motion for Summary Judgment

Rule 56(c) states that affidavits, depositions, and admissions, in addition to the pleadings, shall be considered by the trial court in passing upon the motion. To this expressed list answers to interrogatories should probably be added.[36] Rule 56(e) stipulates that affidavits should present facts admissible in evidence and shall be made on personal knowledge by

30. Alamo Refining Co. v. Shell Development Co., 84 F. Supp. 325 (D. Del. 1949).

31. See Smith, *The Power of a Judge to Direct a Verdict,* 24 Col. L. Rev. 111 (1924), for an excellent comparison of this test with that formerly contained in N.Y.C.P.A. Rule 457-a, *i.e.,* that the judge may direct a verdict when he would be compelled to set aside a contrary verdict as against the weight of the evidence. As amended by Laws 1949, c. 604, this section now reads, "The court may direct a verdict when it would be required to set aside a contrary verdict for legal insufficiency of evidence." See Blum v. Fresh Grown Preserve Corp., 292 N.Y. 241, 54 N.E.2d 809 (1944), for the interpretation given to the former version of § 457-a.

32. *E.g.,* Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627 (1944); Hurd v. Sheffield Steel Corp., 181 F.2d 269 (8th Cir. 1950); Engl v. Aetna Life Ins. Co., 139 F.2d 469 (2d Cir. 1943); Radio City Music Hall v. Unied States, 135 F.2d 715 (2d Cir. 1943); Ramsouer v. Midland Valley R. Co., 135 F.2d 101 (8th Cir. 1943); Port of Palm Beach Dist. v. Goethals, 104 F.2d 706 (5th Cir. 1939); Miller v. Hoffman, 1 F.R.D. 290 (D.N.J. 1940). See Chadbourn, *A Summary Judgment Procedure for North Carolina,* 14 N.C.L. Rev. 211 (1935).

33. *See* Toebelman v. Missouri-Kansas Pipe Line Co., 130 F.2d 1066 (3d Cir. 1942).

34. *E.g.,* Firemen's Mut. Ins. Co. v. Aponaug Mfg. Co., 149 F.2d 359 (5th Cir. 1945).

35. *See* Madeirense do Brasil S/A v. Stulman-Emrick Lumber Co., 147 F.2d 399, 405 (2d Cir. 1945).

36. *E.g.,* Frederick Hart & Co. v. Recordgraph Corp., 160 F.2d 580 (3d Cir. 1948).

affiants competent to testify. From these provisions it would seem that the conventional rules of evidence are to be applied by the courts in adjudicating a motion for summary judgment.[37]

Content of Evidentiary Matter.—Where the movant's evidentiary matter is partially inadmissible under the rules of evidence, the courts have nevertheless granted summary judgment upon such a showing if the admissible portion was sufficient,[38] though the acceptance of an offer of such evidence at a trial is discretionary with the trial court, absent objection.[39] *A fortiori* this rule should be applied to the opponent's evidentiary matter for the courts tend to resolve any doubts as to the existence of a genuine issue of fact in his favor. Hearsay statements in affidavits,[40] especially if the affiant is the proponent's counsel,[41] have been held to be faulty on motion for summary judgment, even if the proponent was the defending party.[42] The courts tend to invoke the tenuous rule against "opinion" evidence, especially when examining the movant's papers; for example, general statements as to the execution of an assignment without accounting for eye-witnesses;[43] or as to the validity of a collective-bargaining agreement;[44] or, in a declaratory judgment suit, that the plaintiff "understood" he would be subjected to a threat of infringement;[45] or, in an anti-trust action, that the restrictive arrangements were not illegal,[46] have all been held to be inadmissible. However, it has been held that in a wrongful death action by a passenger's administrator against the insurance company, a record of the testimony of the driver in his criminal prosecution for manslaughter should have been considered,[47] though it would probably be inadmissible in evidence at a trial.[48] The

37. The scope of examination allowed in depositions and interrogatories to parties is not necessarily limited to matters admissible at a trial, "if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence." See Rules 26(b), 33. But at a trial only that part admissible under the rules of evidence may be received. Rule 26(d). Admissions (Rule 36) need only be relevant and not privileged; if not, objections must be made seasonably by the opposing party.

38. Cromwell v. Hillsborough Twp., 149 F.2d 617 (3d Cir. 1945); New York Life Ins. Co. v. Wilkinson Veneer Co., 86 F. Supp. 863 (E.D. La. 1949); Dickheiser v. Pennsylvania R. Co., 5 F.R.D. 5 (E.D. Pa. 1945). This rule is necessary because depositions and interrogatories as taken may contain inadmissible matter. See note 37 *supra*.

39. 1 WIGMORE, EVIDENCE § 17 (3d Ed. 1940).

40. United States v. Kehoe, 4 F.R.D. 306 (M.D. Pa. 1945).

41. Robinson v. Waterman S.S. Co., 8 F.R.D. 155 (D.N.J. 1948).

42. Seward v. Nissen, 2 F.R.D. 545 (D. Del. 1942); Thermo-Plastics Corp. v. International Pulverizing Corp., 42 F. Supp. 408 (D.N.J. 1941).

43. Houghton-Mifflin Co. v. Stackpole Sons, Inc., 113 F.2d 627 (2d Cir. 1940).

44. Walling v. Fairmont Creamery Co., 139 F.2d 318 (8th Cir. 1943).

45. Thermo-Plastics Corp. v. International Pulverizing Corp., 42 F. Supp. 408 (D.N.J. 1941); *cf.* Chiplets, Inc. v. June Dairy Prod. Co., 89 F. Supp. 814 (D.N.J. 1950).

46. International Salt Co. v. United States, 332 U.S. 392 (1947); Associated Press v. United States, 321 U.S. 1, 6 (1944).

47. Whitaker v. Coleman, 115 F.2d 305 (5th Cir. 1940).

48. Whether the strict requirement of identity of parties at a former proceeding is necessary to satisfy the hearsay rule is debatable. Nevertheless the courts have usually insisted on it unless the cross-examining party in the previous proceeding was in "privity" with the present party opponent. 5 WIGMORE, EVIDENCE, §§ 1386-88 (3d Ed. 1940).

court, embarassed by the rules of evidence, escaped by saying that the technically inadmissible evidence should have apprised the trial court that on trial the opponent might establish a genuine issue of fact,[49] and accordingly a summary disposition of the case was inadvisable. Whether or not this relaxation should be extended generally to exclude hearsay or opinion evidence is doubtful; there are procedures in the Federal rules which should enable the opponent to produce actual evidence in opposition to the motion,[50] if he has a genuine claim or defense.

Credibility.—As the function of the court is merely to ascertain whether there is a genuine issue of material fact, it follows that generally the court should not question the "credibility" of either of the affiants. Accordingly, affidavits attacking the credibility of the opponent's evidentiary matter should not be considered.[51] However, it appears unjustified to hold that where the opponent submits no affidavits or other evidentiary matter at all, to grant summary judgment on the movant's showing involves passing upon the latter's credibility, and is erroneous because his credibility raises a genuine issue of fact.[52] To so reason renders the motion for summary judgment nugatory.

Ex parte Affidavits.—Theoretically, there is no reason why affidavits or other testimony of interested parties may not be a proper foundation for the grant of summary judgment. However, in *Toebelman v. Missouri-Kansas Pipe Line Co.*, a leading case in the Third Circuit, the court issued a caveat to the basing of summary judgment upon such affidavits.[53] As the action was a stockholders' derivative suit for an accounting against the directors for misspent funds, the resultant fact that the information needed was within the sole knowledge of the defendants, and that discovery had been denied below to the plaintiffs,[54] may have justified the court in issuing the caveat. It is submitted, however, that in the absence of these complicating factors, summary judgment may properly be granted on ex parte affidavits alone, despite the fact that they are necessarily hearsay. In theory such grant, depending on the existence of a "genuine issue of material fact," is equally appropriate when the supporting matter is affidavits of interested parties, if the opponent has advanced none to

49. Whitaker v. Coleman, 115 F.2d 305, 307 (5th Cir. 1940).

50. 50 *E.g.*, Rules 26 (Depositions); 33 (Interrogatories to Parties); 34 (Production of Documents); 35 (Physical and Mental Examinations); 36 (Admissions). See Pike and Willis, *The New Federal Deposition-Discovery Procedure: II*, 38 COL. L. REV. 1436, 1455 (1938).

51. Firemen's Mut. Ins. Co. v. Aponaug Mfg. Co., 149 F.2d 359 (5th Cir. 1945); *cf.* Arenstein v. Porter, 154 F.2d 464 (2d Cir. 1946), 55 YALE L.J. 810 (1946).

52. *See* Newark Evening News Pub. Co. v. King Features Syndicate, 7 F.R.D. 645, 647 (D.N.J. 1948), which seems to so indicate, though the action was for injunctive relief under the Clayton Act, a type of proceeding in which the courts are very reluctant to grant summary judgment.

53. 130 F.2d 1016, 1022 (3d Cir. 1942).

54. The district court appointed an accountant to examine defendant's books and prepare a report, 41 F. Supp. 334 (D.Del. 1941).

create an issue.[55] This controversy was squarely before the Supreme Court in *Sartor v. Arkansas Natural Gas Corp.*,[56] in which the sole issue was the market price of gas sold by plaintiffs upon delivery to defendant. Defendant moved for summary judgment, filing the affidavits of eight experts who were privy in interest to defendant. While another factor in the case was the reluctance of the court to allow a summary disposition on the issue of damages,[57] the court also refrained from accepting as conclusive the opinion evidence of defendant's experts.[58] Chief Justice Stone, dissenting,[59] remarked that it was "unduly restrictive" of the summary judgment procedure to deny the motion because it was supported by ex parte affidavits, in view of the fact that plaintiffs had introduced no evidentiary matter in opposition, and had not asked for a continuance to take depositions.[60] It is submitted that this latter view is preferable.

Parol Evidence Rule.—Adjudication of motions for sumary judgment has not been free from the incidence of the familar rule of evidence excluding parol negotiations or representations from proof when the parties have "apparently integrated a complete writing."[61] Where evidentiary matter has been presented explaining that the description of land contained in a deed was merely copied from an old deed,[62] and that the parties knew that the boundaries were different; or showing that a representation granting an 18-month right of rescission was made;[63] or that a down payment was not payable until the happening of an unexpressed condition,[64] the courts have received the parol evidence and held that a genuine issue of fact was created. On the other hand, proof of knowledge of an insurance agent where the policy contained a waiver clause,[65] or of alleged parol negotiations that were "intended to be the real contract of the parties,"[66] has been excluded from consideration. It is submitted that the problem of whether to receive such evidence on motion for summary judgment does not materially differ from the problem of receiving it at a trial, since presumably its admissibility depends only upon the integrated

55. Board of Public Instruction v. Meredith, 119 F.2d 713 (5th Cir. 1941); *cert. denied* 314 U.S. 656 (1941).

56. 321 U.S. 620 (1944).

57. *Id.* at 623.

58. *Id.* at 627.

59. Justice Reed concurred in the dissent.

60. *Id.* at 631.

61. The parol evidence rule is without the scope of this note. See McCormick, *The Parol Evidence Rule as a Procedural Device for the Control of the Jury*, 41 YALE L.J. 365 (1932), for the procedural aspects; Corbin, *The Parol Evidence Rule*, 53 YALE L.J. 603 (1944), for the application of the rule to contracts, conveyances, etc.

62. Miller v. Adelson, 4 F.R.D. 177 (W.D. Pa. 1944).

63. Merchants' Distilling Corp. v. American Beverage Corp., 33 F. Supp. 304 (D. Del. 1940).

64. Synchem, Inc., v. American Hyalsol Corp., 82 F. Supp. 685 (D. Del. 1949).

65. Trinity Universal Insurance Co. v. Woody, 47 F. Supp. 327 (D.N.J. 1942).

66. Russell v. Barnes Foundation, 50 F. Supp. 174 (E.D. Pa. 1943), *appeal dismissed* 136 F.2d 655 (3d Cir. 1943).

appearance of the writing. Those authorities adopting a more cynical view of the rule, however, have roundly criticised its application on motion for summary judgment.[67]

PRODUCTION OF OPPOSING EVIDENTIARY MATTER

Mere formal controversion of the movant's evidentiary matter by the pleadings without more should not establish the existence of a genuine issue of fact and thus preclude the grant of summary judgment. As a corollary to this proposition it follows that to preclude such grant the opponent is required to produce enough evidentiary matter so that a reasonable trier of fact might find for him. It is not surprising, then, to find sprinkled throughout the cases statements to the effect that the facts in the movant's evidentiary matter are taken as true unless contradicted by opposing affidavits,[68] or that the opponent has the "burden" to contradict the movant's case,[69] or that his failure to file any affidavits or to move for discovery "admitted" the movant's facts.[70] Where the movant's prayer for summary judgment is based upon new matter in bar of the claim, such as the statute of limitations or res judicata, it would seem that the obligation to go forward with proof to the contrary would be strongest, for by definition the new matter has not been contradicted even by the opponent's pleading.[71] However, where the opponents pleading does contradict the movant's evidentiary matter, in many cases the former party was not rquired to come forth with contradictory matter.[72] Of course, where the movant's own depositions disclose a genuine issue of fact there is no necessity for his opponent to come forward with matter in opposition.[73] But where the movant's evidence is unequivocal, and uncontradicted, the theory of Rule 56 calls for the grant of summary judgment. Nevertheless, the courts often refuse such grant, probably due to the fundamental apprehension that a full trial of the case, with cross-examination, might produce some genuine issues, or that the opponent should not be "forced" to have discovery.[74] One case has suggested that where the

67. Zell v. American Seating Co., 138 F.2d 641 (2d Cir. 1943).

68. Juniper Mills v. Landenberger & Co., 6 F.R.D. 463 (E.D. Pa. 1947); Geller v. Transamerica Corp., 53 F. Supp. 625 (D. Del. 1943); *cf.* Board of Public Instruction v. Meredith, 119 F.2d 713 (5th Cir. 1941), *cert. denied* 314 U.S. 656 (1941). *But cf.* Madeirense do Brasil S/A v. Stulman-Emrick Lumber Co., 147 F.2d 399, 405 (2d Cir. 1945) (dissenting opinion).

69. Radio City Music Hall v. United States, 135 F.2d 715 (2d Cir. 1943).

70. Morris v. Prefabrication Engrg. Co., 181 F.2d 23 (5th Cir. 1950); Wilkinson v. Powell, 149 F.2d 335 (5th Cir. 1945); Allen v. Radio Corp. of America, 47 F. Supp. 244 (D. Del. 1942).

71. Reynolds v. Needle, 132 F.2d 161 (D.C. Cir. 1942); Carpenter v. Rohm & Haas Co., 75 F. Supp. 732 (D. Del. 1948); see note 19 *supra.*

72. *E.g.*, Chiplets, Inc. v. June Dairy Prod. Co., 89 F. Supp. 814 (D.N.J. 1950); Robinson v. Waterman S.S. Co., 8 F.R.D. 155 (D.N.J. 1948); Greenleaf v. Brunswick-Balke-Collender Co., 79 F. Supp. 362 (E.D. Pa. 1947). In Albert Dickinson Co. v. Mellos Peanut Co., 179 F.2d 265 (7th Cir. 1950), it was intimated that verification of the complaint might serve as an acceptable substitute.

73. Griffith v. William Penn Broadcasting Co., 4 F.R.D. 475 (E.D. Pa. 1945).

74. Madierense do Brasil S/A v. Stulman-Emrick Lumber Co., 147 F.2d 399, 405 (2d Cir. 1945) (dissenting opinion).

moving papers include depositions, which give the opponent an opportunity for cross-examination, the obligation to produce contrary matter is present, while if the moving papers were limited to affidavits, the opposite result should obtain.[75] These and other reasons expressed for excusing the non-production of opposing evidentiary matter will now be discussed.

Facts Which Might Be Proved At a Trial.—An oft-recurring expression of the court's reluctance to grant summary judgment to a movant who has apparently established an uncontradicted case is that the opponent "might" prove facts at a trial which could entitle him to recover, if believed. When the case involves the interpretation of a general word or phrase in a statute or contract, such as a "required insurance policy" in a financial responsibility law,[76] or an "officer" of a corporation under the Securities Exchange Act,[77] or whether an airplane in which insured was riding when killed was a "commercial" airplane within the meaning of the policy,[78] or whether baseball players are "temporary employees" within the meaning of the Selective Service Act,[79] or whether certain bank employees are engaged in "interstate commerce" under the Fair Labor Standards Act,[80] it has been held that the opponent should have an opportunity to prove facts supporting his contentions at a trial; though the opposite result was obtained in determining whether certain actors were "employees" or "independent contractors" within the Fair Labor Standards Act.[81] In actions for the infringement of patents or trademarks,[82] for unreasonable restraints of trade under the Clayton Act,[83] and for misuse of corporate funds,[84] a similar tendency to allow the opponent to go to trial has been present. On the other hand, when the basis of the motion is the statute of limitations, that tendency has been otherwise.[85] There seems to be an inclination in this type of case to grant or deny summary judgment according to the persuasiveness of the movant's showing, though in theory a "genuine issue" depends on whether any matter be produced in opposition. Those courts which do not allow a full trial reason that the motion is to be decided on the record actually before the trial court, and not on one "potentially possible." [86] Nevertheless, where the case involves complicated or "vague" issues of fact the tendency to allow the opponent a

75. Radio City Music Hall v. United States, 135 F.2d 715 (2d Cir. 1943).
76. Merchants Indemnity Corp. v. Peterson, 113 F.2d 4 (3d Cir. 1940).
77. Colby v. Klune, 13 Fed. Rules Serv. 56c41, Case 7 (2d Cir. 1949).
78. Grimes v. New York Life Ins. Co., 84 F. Supp. 989 (E.D. Pa. 1949).
79. Reeser v. Philadelphia Nat. League Club, 84 F. Supp. 947 (E.D. Pa. 1949).
80. Bozant v. Bank of New York, 156 F.2d 787 (2d Cir. 1946).
81. Radio City Music Hall v. United States, 135 F.2d 715 (2d Cir. 1943).
82. Avrick v. Rockmont Envelope Co., 155 F.2d 568 (10th Cir. 1946), discussed in Melville, *Summary Judgment and Discovery,* 34 A.B.A.J. 187 (1948); Blum Adv. Corp. v. Mayers Co., 25 F. Supp. 934 (E.D. Pa. 1938).
83. Greenleaf v. Brunswick-Balke-Collender Co., 79 F. Supp. 362 (E.D. Pa. 1947); Electrical Fittings Corp. v. Thomas & Betts Co., 3 F.R.D. 356 (D.N.J. 1943).
84. Toebelman v. Missouri-Kansas Pipe Line Co., 130 F.2d 1016 (3d Cir. 1942).
85. Gifford v. Travelers Protective Ass'n, 153 F.2d 209 (9th Cir. 1946); Reynolds v. Needle, 132 F.2d 161 (D.C. Cir. 1942).
86. Madeirense do Brasil S/A v. Stulman-Emrick Lumber Co., 147 F.2d 399, 405 (2d Cir. 1945).

full trial has been strong.[87] Whether or not this reason is valid is problematical. The mere existence of a complicated issue of fact should not excuse a complete non-production of evidentiary matter by the opponent. On the other hand it should require an extremely liberal interpretation of the matter actually introduced by him, giving the benefit of all possible inferences from the evidentiary facts.

Facts Peculiarly Within Knowledge of Movant.—Another factor tending toward the denial of summary judgment is the fact that the relevant evidence is peculiarly within knowledge of the movant. The operation of this factor is understandable when it is recalled that the motion for summary judgment may be made at any time after 20 days after the commencement of the action.[88] The opponent upon service of such a motion is in a predicament if all of the relevant facts are within the movant's control. The framers of the rules foresaw this situation and provided in Rule 56(f) that if by affidavit the opponent states his reasons why he cannot present facts in support of his opposition, the court might deny the motion or order a continuance so that affidavits or depositions might be taken or discovery had. It is to be noted that the opponent may not remain dormant and argue at the hearing that he could not obtain any information, but must present such matter by affidavit. In the leading *Toebelman*[89] case, the action was by stockholders for an accounting of funds misspent by the defendant directors. The district court denied plaintiffs' motion for a continuance but appointed an accountant to examine the corporate defendant's books and prepare a report, and granted summary judgment for defendants.[90] On appeal, it was held that plaintiffs' prayer for depositions and discovery should have been granted.[91] It is submitted that this is the proper method of disposing of such a case. Other courts, however, have been liberal in allowing the opponent to have a trial, and apparently have not relied upon continuances to give the opponent an opportunity to present facts. For example, where the issue is the negligence of the movant's employees,[92] or the validity of the assignment of certain copyrights to the movant,[93] or whether the negligent driver was operating an automobile with the consent of the insured,[94] or the plagiarism of copyrighted music by the movant,[95] or whether the movant's employees are engaged in interstate commerce,[96] the courts have held that the opponent is entitled to a trial. However, where the issue

87. Bozant v. Bank of New York, 156 F.2d 987 (2d Cir. 1946); Doehler Metal Furniture Co. v. United States, 149 F.2d 130 (2d Cir. 1945); *see* California Apparel Creators v. Wieder of California, 162 F.2d 893 (2d Cir. 1947) (dissenting opinion).
88. Rule 56(a), as amended.
89. Toebelman v. Missouri-Kansas Pipe Line Co., 130 F.2d 1016 (3d Cir. 1942).
90. 41 F. Supp. 334 (D. Del. 1941).
91. *Id.* at 1022.
92. Robinson v. Waterman S.S. Co., 8 F.R.D. 155 (D.N.J. 1948).
93. Houghton Mifflin Co. v. Stackpole Sons, Inc., 113 F.2d 627 (2d Cir. 1940).
94. Whitaker v. Coleman, 115 F.2d 305 (5th Cir. 1940).
95. Arenstein v. Porter, 154 F.2d 464 (2d Cir. 1946), 55 YALE L.J. 810 (1946).
96. Bozant v. Bank of New York, 156 F.2d 787 (2d Cir. 1946).

was the fraudulent concealment of facts by the majority stockholders,[97] or whether the movant's actors were employees under the Fair Labor Standards Act,[98] the movant was permitted to have summary judgment. It is arguable that absent a bona fide showing by the opponent of the necessity of taking depositions or affidavits, the court should grant judgment for the movant. If the opponent has a real defense, it is probable that he either has evidence within his control to establish that defense, or knows where to get it by deposition or otherwise. The movant should not be subjected to the inconvenience of a trial on the basis of some vague hope or expectation that his opponent might construct a case out of cross-examination alone.[99]

Conversely, when the evidentiary facts are peculiarly within the opponent's knowledge, the courts have reasonably been less hesitant in granting summary judgment. Thus, where the issue is whether notice was given by defendant township of a tax reassessment hearing,[100] or whether defendant surety's lawyer had participated in an action against the principal,[101] or whether defendant had violated O. P. A. ceiling prices,[102] or whether plaintiff was barred by laches,[103] the movant has prevailed. In view of the opponent's failure to proffer any evidentiary matter when he is presumably in a position to do so, the courts are usually justified in concluding that no genuine issue of fact is present nor would one be present at a trial.[103a]

Particular Classes of Actions

Though Rule 56 is applicable to all types of civil actions, its operation in several particular classes has been either furthered or impeded by the inherent presence of the factors that have been enumerated *supra* as tending toward the grant or denial of summary judgment. These factors have particularly affected proceedings for review and enforcement of administrative orders, under the Anti-trust Acts, and for infringement of patents, copyrights, and trademarks.

Review and Enforcement of Administrative Orders.—Summary judgment is particularly adapted to the review of administrative orders because there has already been a hearing of the case. Since the courts are bound

97. Geller v. Transamerica Corp., 53 F. Supp. 625 (D. Del. 1943).

98. Radio City Music Hall v. United States, 135 F.2d 715 (2d Cir. 1943).

99. Arenstein v. Porter, 154 F.2d 464 (2d Cir. 1946) (dissenting opinion); *cf.* Peckham v. Ronrico Corp., 7 F.R.D. 324 (D. Puerto Rico 1947); 61 Harv. L. Rev. 375 (1947).

100. Cromwell v. Hillsborough Twp., 56 F. Supp. 41 (D.N.J. 1944), *aff'd*, 149 F.2d 617 (3d Cir. 1945), *aff'd* 326 U.S. 620 (1946).

101. Herzog v. DesLauriers Steel Mould Co., 46 F. Supp. 211 (E.D. Pa. 1942).

102. Schreffler v. Bowles, 153 F.2d 1 (10th Cir. 1946), *cert. denied* 328 U.S. 820 (1946), discussed in Melville, *Summary Judgment and Discovery*, 34 A.B.A.J. 187 (1948).

103. Dixon v. American Tel. & Tel. Co., 159 F.2d 863 (2d Cir. 1947).

103a. Montmarquet v. Johnson & Johnson, 82 F. Supp. 469 (D.N.J. 1949), *aff'd* 179 F.2d 240 (3d Cir. 1950), *cert. granted* 18 U.S.L. Week 3307 (U.S. April 19, 1950).

to lend "great weight" to the findings of the administrative body,[104] or the decision is purely "discretionary" and not reviewable unless there was "fraud" in its procurement,[105] or the courts are bound to affirm the order if there was "substantial evidence" to support it,[106] there is frequently no genuine issue of fact because no evidence is acceptable outside of the record of the administrative hearing, unless it is to show that the order was made "without jurisdiction." [107] But where there are additional issues as to the willfulness of rent overcharges,[108] or as to the granting of an injunction because of repeated violations of the statute,[109] summary judgment as to these additional issues has been denied. Courts in general have been wary of a summary disposition of cases where the state of mind of the opponent is in issue.

Anti-Trust Suits.—Anti-Trust Suits involve complicated issues of fact, knowledge of which is usually restricted to the defendants. That being the case, the courts have usually denied summary judgment when the movant is the alleged violator. It has been held, for example, that a license agreement not objectionable on its face might be shown to be restrictive at a trial,[110] or the exclusion of the opponent from a billiards tournament might be shown unjustified.[111] However, it has also been observed that there is no reason why summary judgment procedure is inapposite to anti-trust actions;[112] and, where for example, the defendants admitted the alleged restrictive arrangements, but defended the legality thereof, judgment was granted for the United States, because the admitted contracts were "unreasonable per se." [113] This latter label seems to be

104. Bowles v. Ward, 65 F. Supp. 880 (W.D. Pa. 1946).

105. New Jersey Worsted Mills v. Gnichtel, 31 F. Supp. 908 (D.N.J. 1940).

106. Wawa Dairy Farms v. Wickard, 56 F. Supp. 67 (E.D. Pa. 1944), *aff'd* 149 F.2d 869 (3d Cir. 1945); Woods v. Mikelberg, 80 F. Supp. 222 (E.D. Pa. 1948); National Broadcasting Corp. v. United States, 47 F. Supp. 940 (S.D.N.Y. 1942). In Hennessey v. Federal Security Admr., 88 F. Supp. 664 (D. Conn. 1949), summary judgment was granted to the plaintiff, after defendant had moved therefor, despite the absence of a cross-motion.

107. Pinkus v. Reilly, 71 F. Supp. 993 (D.N.J. 1947); *aff'd* 170 F.2d 786 (3d Cir. 1948), *aff'd without prejudice to re-open proceeding* 70 S.Ct. 110 (1949) (irregularities in administrative proceeding).

108. Woods v. Mertes, 9 F.R.D. 318 (D. Del. 1949); Woods v. Contestabile, 81 F. Supp. 737 (E.D. Pa. 1949); Creedon v. Evangelista, 77 F. Supp. 538 (E.D. Pa. 1948); Bates v. McClees, 76 F. Supp. 939 (E.D. Pa. 1948); Fleming v. Dorsey, 72 F. Supp. 626 (E.D. Pa. 1947).

109. Woods v. Wallace, 8 F.R.D. 140 (E.D. Pa. 1948). *But cf.* Woods v. Mikelberg, 80 F. Supp. 222 (E.D. Pa. 1948).

110. Electrical Fittings Corp. v. Thomas & Betts Co., 3 F.R.D. 256 (D.N.J. 1943). In *Newark* Evening News Pub. Co. v. King Features Syndicate, 7 F.R.D. 645 (D.N.J. 1948), summary judgment was denied to the complainants, even though no evidentiary matter was introduced by the alleged violators, indicating a reluctance to grant summary judgment in this type of case at the instance of either party.

111. Greenleaf v. Brunswick-Balke-Collender Co., 79 F. Supp. 362 (E.D. Pa. 1947).

112. *E.g.,* Associated Press v. United States, 326 U.S. 1, 6 (1944); United States v. General Instrument Corp., 87 F. Supp. 157 (D.N.J. 1949).

113. International Salt Co. v. United States, 332 U.S. 392 (1947).

another device used to restrict the evidence that will be received, analogous to the parol evidence rule, and thus in effect to say that there is no genuine issue of *material* fact, though there may be an issue of fact.

Patents, Copyrights, and Trademarks.—Similarly, in actions involving the scope, validity, or infringement of patents, copyrights, and trademarks, the complexity of the fact issues militates against the grant of summary judgment. Those cases denying summary judgment have done so regardless of the fact that the opponent has proffered no evidentiary matter, usually on the broad ground that the interpretation of patents or copyrights, or the exclusive right to a trade name presents too complex a fact issue to be decided on motion for summary judgment,[114] or on a reluctance to posit the result on a comparison of the patented or copyrighted product with the alleged infringing product without a full trial.[115] One case went so far as to hold that the opponent is not even required to specify his claims of infringement.[116] While it is to be observed that the complexity of the factual issues and the necessity of expert testimony are valid reasons for a reluctance to grant summary judgment unless the absence of a genuine fact issue is absolutely clear, the same factors also render it easier to assert a groundless claim or defense in the hope of an out-of-court settlement. It is submitted that on motion for summary judgment in this type of case the opponent ought at least be required to specify instances of infringement or to establish a degree of similarity between the patented and infringing products which prima facie lends concrete support to the charges.

The establishment of a "justiciable controversy" sufficient to grant the court jurisdiction in a declaratory judgment suit to establish lack of infringement has been a concurrent problem in patent cases. Especially in the later cases, a reluctance to summarily dispose of the case because the opponent has not proved a direct charge of infringement by the movant has been shown.[117] Whether or not this reluctance is justified is problem-

114. Avrick v. Rockmont Envelope Co., 155 F.2d 568 (10th Cir. 1946); Burt v. Bilofsky, 9 F.R.D. 299 (D.N.J. 1949); Union Nat. Bank v. Superior Steel Corp., 9 F.R.D. 123 (W.D. Pa. 1949); Chemicol Foundation, Inc. v. Universal-Cyclops Steel Corp., 2 F.R.D. 283 (W.D. Pa. 1942); Reiser v. McKee Glass Co., 1 F.R.D. 170 (W.D. Pa. 1940); *cf.* Lipson v. Interstate Home Equipment Co., 57 F. Supp. 955 (D. Del. 1942). *But cf.* Allen v. Radio Corp. of America, 47 F. Supp. 244 (D. Del. 1942). However, there is no reason why summary judgment is not applicable to this type of proceeding. Allen v. Radio Corp., *supra; see* Bridgeport Brass Co. v. Bostwick Labs., 181 F.2d 315 (2d Cir. 1950); Houghton Mifflin Co. v. Stackpole Sons, Inc., 113 F.2d 627, 628 (2d Cir. 1940); and there is no "presumption of validity" from the mere grant of the patent as will preclude summary judgment. Juniper Mills, Inc. v. Landberger, 6 F.R.D. 463 (E.D. Pa. 1947).

115. Albert Dickinson Co. v. Mellos Peanut Co., 179 F.2d 265 (7th Cir. 1950); Avrick v. Rockmont Envelope Co., 155 F.2d 568 (10th Cir. 1946); Arenstein v. Porter, 154 F.2d 464 (2d Cir. 1946); 55 YALE L.J. 810 (1946).

116. Blum Adv. Corp. v. L. & C. Mayers Corp., 25 F. Supp. 934 (E.D. Pa. 1938).

117. Frederick Hart & Co. v. Recordgraph Corp., 169 F.2d 580 (3d Cir. 1948); Alamo Ref. Co. v. Shell Development Co., 84 F. Supp. 325 (D. Del. 1949); Crosley Corp. v. Hazeltine, 66 F. Supp. 893 (D. Del. 1946); Latrobe Electric Steel Co. v. Vascoloy-Ramet Corp., 56 F. Supp. 37 (D. Del. 1944). *But cf.* Thermo-Plastics Corp. v. International Pulverizing Corp., 42 F. Supp. 408 (D.N.J. 1941).

atical. The courts ought to insist that the opponent establish an actual threat before he will be allowed to have a trial, because the existence of such a threat is a matter within his own knowledge; accordingly he should be expected to prove it on motion for summary judgment.

Differentiation Between Rules 12 and 56

Rule 12, which provided for motions to dismiss[118] and for judgment on the pleadings,[119] formerly made no allowance for cases in which the motions were so labeled by the movant, but in which such evidentiary matter outside the pleadings as would be appropriate on a motion for summary judgment was received by the court. A justifiable hesistancy to deny the motion on the face of the pleadings alone when the evidentiary matter disclosed no "genuine issue of material fact" was expressed by many courts,[120] for the label annexed by the movant should not be the determinant,[121] and it was held that the court should treat the case as if a motion for summary judgment had been made. This practice has been codified in Rule 12 (b), as amended, which now makes it mandatory that the court treat the motion as for summary judgment if the extraneous evidentiary matter is "not excluded," and provides that all parties shall have an opportunity to have discovery and take affidavits.[122]

The leading case of *Frederick Hart & Co. v. Recordgraph Corp.*,[123] decided in the District Court prior to the effective date of the amendment to Rule 12, has been the source of some confusion in this respect. In that case the issue was the existence of a threat of infringement of the defendant's patents. Defendant moved to dismiss the complaint on the basis of affidavits and answers to interrogatories introduced by both parties allegedly showing the lack of such threat, and also moved for summary judgment. The district court granted the motion to dismiss but "made no disposition of the motion for summary judgment."[124] On appeal, the Circuit Court held that the complaint was improperly dismissed as a genuine issue of fact was presented as to whether a threat of infringement had been made. The result was probably correct in view of the content of the evidentiary matter, but a dictum stated that an affidavit can not for purposes of the motion to dismiss be treated as "proof contrary to the well-pleaded

118. Rule 12(b), as amended.
119. Rule 12(c).
120. *E.g.*, Victory v. Manning, 128 F.2d 415 (3d Cir. 1942); Gallup v. Caldwell, 120 F.2d 90 (3d Cir. 1941); Central Mexico Light & Power Co. v. Munch, 116 F.2d 85 (2d Cir. 1940). See Note, *Speaking Motions Under New Federal Rule 12(b)(6)*, 9 Geo. Wash. L. Rev. 174 (1940); Commentary, *The Speaking Motion*, 6 Fed. Rules Serv. 741 (1943).
121. Boro Hall Corp. v. General Motors Corp., 124 F.2d 822 (2d Cir. 1942); *cert. denied*, 317 U.S. 695 (1943); see Pike, *Current Trends in the Construction of the Federal Rules of Civil Procedure*, 16 Cal. St. Bar J. 152 (1941).
122. See Notes of Advisory Committee on Rules, Rule 12, U.S. Code Cong. Serv., 79th Cong., 2d Sess. 2322 (1946); Clark, *Experience Under the Amendments to the Federal Rules of Civil Procedure*, 8 F.R.D. 497, 501 (1949).
123. 169 F.2d 580 (3d Cir. 1948).
124. 73 F. Supp. 146 (D. Del. 1947).

facts in the complaint." [125] While technically correct prior to the amendment of Rule 12(b), under the present practice this dictum is misleading, for if the court receives extraneous evidentiary matter it is bound to decide the "motion to dismiss" as a motion for summary judgment; and as has been submitted, the allegations of the complaint, even if "well pleaded," should not establish a genuine issue of fact without outside support. Nevertheless, the district courts have cited the *Hart* dictum extensively and have refrained from disposing of motions to dismiss according to the amendment,[126] and this view seems to be supported by the circuit court, which expressed a fear that "adjudication" of allegations in pleadings prior to trial and the "resolving of the issues of fact" at that time would lead to a necessity for "pre-pre-trial procedures." [127] It is submitted that this dire consequence will never materialize if the proper function of the trial court on motion for summary judgment is followed, *i. e.* to decide only whether there are bona fide issues of fact to be tried.

"Partial" Summary Judgment

Rule 56(d) provides that whenever the court does not "render judgment" on the whole case on motion for summary judgment, a pre-trial order must be made specifying the facts that appear to be uncontradicted and the facts upon which a genuine issue exists. That this practice is analogous to the permissive pre-trial practice of Rule 16, except that it is mandatory, has been recognized by the courts.[128] Some text writers have contended that the label "partial summary judgment" is erroneous [129] as the decision is a mere interlocutory order and is not appealable, even if the only issue remaining to be tried is damages.[130] At any rate, it is clear that the same considerations as affect the grant or denial of summary judgment of the whole case necessarily apply to a summary disposition of only part of the issues; and where part of the relief demanded is punitive damages or an injunction, the courts have usually declined to summarily dispose of those issues, but have only so disposed of the issue of liability.[131]

125. 169 F.2d at 581.

126. Reynolds Metals Co. v. Metals Disintegrating Co., 8 F.R.D. 349 (D.N.J. 1948) (containing an illuminating discussion of the problem), *aff'd* 176 F.2d 90 (3d Cir. 1949); Pittston-Luzerne Corp. v. United States, 84 F. Supp. 800 (M.D. Pa. 1949); Alamo Refining Co. v. Shell Development Co., 84 F. Supp. 325 (D. Del. 1949); Michel v. Meier, 8 F.R.D. 464 (W.D. Pa. 1948).

127. Reynolds Metals Corp. v. Metals Disintegrating Co., 176 F.2d 90 (3d Cir. 1949).

128. Woods v. Mertes, 9 F.R.D. 318 (D. Del. 1949); see Commentary, *Partial Summary Judgment*, 6 Fed. Rules Serv. 782 (1943).

129. 3 Moore, Federal Practice § 56.09 (1938).

130. Coffman v. Federal Laboratories, 171 F.2d 94 (3d Cir. 1948); Russell v. Barnes Foundation, 136 F.2d 655 (3d Cir. 1943).

131. Woods v. Contestabile, 81 F. Supp. 737 (E.D. Pa. 1949); Woods v. Wallace, 8 F.R.D. 140 (E.D. Pa. 1948); Creedon v. Evangelista, 77 F. Supp. 538 (E.D. Pa. 1948); Bates v. McClees, 76 F. Supp. 939 (E.D. Pa. 1948); Fleming v. Dorsey, 72 F. Supp. 626 (E.D. Pa. 1947); Russell v. Barnes Foundation, 50 F. Supp. 174 (E.D. Pa. 1943).

In 1947 Rule 56(c) was amended by adding a provision that an interlocutory summary judgment may be rendered on the issue of liability alone, though there is a genuine issue as to damages. According to the Advisory Committee on Amendments to the Rules [132] the addition was not meant to change the rule but only to resolve a "doubt" expressed in *Sartor v. Arkansas Natural Gas Corp*,[133] to the effect that cases depending upon questions of damage have been "reserved from the summary judgment process" or at least summary judgment should not be granted unless the evidence is so clear that "a jury would not be at liberty to disbelieve it." It is submitted that Justice Jackson's intent was not to preclude the issuance of a summary judgment when the amount of damages is in question, but rather to focus attention on the need of extraordinary care in this situation.[134] Non constat the alleged doubt, cases in the Third Circuit both before and after the amendment have recognized the propriety of granting summary judgment on the issue of liability alone.[135]

CONCLUSION

The question of the grant or denial of summary judgment presents problems incapable of being methodically pigeonholed by the use of black-letter rules. The institution of the jury as the trier of fact in the common law has become so crystallized as to produce a large amount of judicial inertia opposing extensive summary disposition of cases. On the other hand, impatience with the dilatory aspects of trial practice and the fact that trial by the court is becoming more popular have probably influenced the judiciary in the other direction, though it has been recently observed that crowded trial calendars might be better alleviated by the appointment of more judges.[136] It is submitted that as a minimum the courts ought to insist that upon motion for summary judgment the opponent produce some evidentiary matter in contradiction of the movant's case or specify in an affidavit the reasons why no sources of information are presently available to him. One of the most valuable adjuncts to the federal procedure is that extensive means of obtaining information by the taking of depositions, answers to interrogatories, requests for admissions, etc., have been made available to any party.[137] Accordingly when the opponent defends on the ground of unavailability of information there is no reason why he should not be expected to move for a continuance under Rule 56(f) to gather

132. U.S. CODE CONG. SERV., 79th Cong., 2d Sess. 2357 (1946).
133. 321 U.S. 620 (1943).
134. *Cf.* Chief Justice Stone, dissenting, *id.* at 629; Commentary, *Summary Judgment as to Damages*, 7 FED. RULES SERV. 974 (1944).
135. Cases cited note 131 *supra.*
136. *See* Colby v. Klune, 13 FED. RULES SERV. 56c41, Case 7 (2d Cir. 1949). In Raitt v. Seltzer, 10 F.R.D. 48 (N.D.N.Y. 1950), it was indicated that the fact that the trial calendar was not crowded rendered the summary judgment procedure unnecessary.
137. See Pike and Willis, *The New Federal Deposition-Discovery Procedure: II*, 38 COL. L. REV. 1436, 1456 (1938).

such information.[138] Trial ethics in the federal courts have reached such a stage where it is no longer fashionable to invoke the entire gamut of delaying tactics, and the objection that the opponent "should not be compelled to disclose his case before trial" should not be countenanced.[139] Denial of summary judgment in the vague expectation that upon trial a genuine issue of fact will materialize out of cross-examination or impeachment alone ought not to be practiced.[140]

It is not contended that where complicated issues of fact are present the courts should be free in summarily precluding the opponent. It is still important that such matter as is introduced in his behalf be liberally construed, and a rigid application of the rules of evidence seems to be undesirable, especially where the testimony proffered is not by an interested party. It seems hard in any case, however, to justify a denial of summary judgment predicated on mere pleading allegations, no matter how complicated the issues. Such a practice completely destroys the usefulness of the procedure. In this respect it should be remembered that even where complete summary disposition of the case is not possible, the motion serves the very valuable purpose of requiring an order to be made settling the uncontested issues of fact, thus expediting disposition of the case once it comes to trial.

Christopher Branda, Jr.

Seller's Recovery When Buyer Repudiates Before Completion of Manufacture

When a buyer cancels a contract to purchase goods already completed and in the possession of the seller, the usual measure of damages is the difference between the contract price and the market price at the time for performance.[1] Since the seller can resell for the market price, it is considered that this measure will adequately recompense him for his loss.[2] Where, however, a person contracts to buy goods from a manufacturer or distributor and then cancels the sale before manufacture or procure-

138. Compare the New York practice, discussed in SHEINTAG, THE SUMMARY JUDGMENT 83.

139. Engl v. Aetna Life Ins. Co., 139 F.2d 469 (2d Cir. 1946); Melville, *Summary Judgment and Discovery,* 34 A.B.A.J. 187 (1948).

140. Chandler Laboratories v. Smith, 88 F. Supp. 583 (E.D. Pa. 1950); *see* Arenstein v. Porter, 154 F.2d 464 (2d Cir. 1946) (dissenting opinion), 55 YALE L.J. 810 (1946); Note, *Factors Affecting the Grant or Denial of Summary Judgment,* 48 COL. L. REV. 780, 785 (1948).

1. UNIFORM SALES ACT § 64(3): "Where there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances, showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept."

2. 2 WILLISTON, SALES § 582 (2d ed. 1924); MCCORMICK, DAMAGES § 173 (1935).

ment is completed, the problem of the seller's measure of recovery becomes more difficult since the seller does not have the completed goods to resell.

This situation is covered by section 64(4) of the Uniform Sales Act, which provides that the seller's damages are to be fixed as of the time of the breach.[3] If he continues to manufacture, he cannot increase his damages thereby. The profit he would have made if the contract had been completed is to be "considered" in assessing damages.

The purpose of compensatory damages is, of course, to put the injured party in as good a position as he would have been if the contract had been fully performed.[4] It is the purpose of this Note to examine the adequacy of the seller's remedies in the situation covered by section 64(4) and, where inadequacies appear, to consider the possibilities of improving the seller's position by special provisions in his contract with the buyer. Particular attention will be given to the seller as manufacturer rather than as distributor.[5]

Measure of Recovery as Developed by Cases

General Rule.—Section 64(4) provides that the seller's prospective profit will be "considered."[6] In practice, the majority of courts have done more than merely "consider," holding that when the buyer repudiates before manufacture or procurement, the seller's profit will be the measure of damages.[7] This is computed by subtracting the estimated cost of manufacture, if the seller is a manufacturer, or the cost of procurement, if he is a distributor, from the contract price.[8] If the seller is to deliver, the cost of delivery is also subtracted.[9] In addition, if the manufacturer has bought materials with which to carry out the contract, he can recover the excess of the cost of the materials over their market value at the time of breach.[10] If manufacture has already begun, he can recover the difference

3. "If, while labor or expense of material amount are necessary on the part of the seller to enable him to fulfill his obligations under the contract to sell or the sale, the buyer repudiates the contract or the sale, or notifies the seller to proceed no further therewith, the buyer shall be liable to the seller for no greater damages than the seller would have suffered if he did nothing towards carrying out the contract or the sale after receiving notice of the buyer's repudiation or countermand. The profit the seller would have made if the contract or the sale had been fully performed shall be considered in estimating such damages."

4. Restatement, Contracts § 329, comment *a* (1932).

5. The cases cited will not be restricted to those decided under the Sales Act, since § 64(4) restates the common law rule in the United States. 2 Williston, Sales § 580 (2d ed. 1924).

6. The remedy has been made more certain in Pennsylvania by substituting "allowed for" for "considered." Pa. Stat. Ann., tit. 69, § 293 (Purdon 1931).

7. *E.g.*, United States v. Purcell Envelope Co., 249 U.S. 313 (1919); Miami Cycle Co. v. National Carbon Co., 268 Fed. 46 (6th Cir. 1920); Roland v. Rex Mfg. Co., 49 R.I. 168, 141 Atl. 310 (1928).

8. *E.g.*, Roehm v. Horst, 178 U.S. 1 (1899) (distributor); Snelling v. Dine, 270 Mass. 501, 170 N.E. 403 (1930) (manufacturer); Gelusha v. Scharoun, 87 N.Y.S.2d 381 (Sup. Ct. 1949) (manufacturer).

9. Kingman & Co. v. Western Mfg. Co., 92 Fed. 486 (8th Cir. 1899).

10. *E.g.*, Wood v. Brighton Mills, 297 Fed. 594 (3d Cir. 1924); Bullard v. Eames, 219 Mass. 49, 106 N.E. 584 (1914).

between the cost of labor and materials and the amount he can obtain for the partially completed goods, assuming the cost to be greater.[11]

It has been held in some cases that there should be a reasonable deduction from the damages for relief from the risk and responsibility of full performance and for the saving in time.[12] Most courts, however, have not included this item, perhaps because of the speculative character of the amount of the deduction and because of a reluctance to give the repudiating buyer this benefit.

Determination of Profit.—Many courts have shown a liberal attitude as to the awarding of *some* damages for loss of the seller's prospective profit,[13] but there has been a great deal of difficulty in computing what the profit would have been.[14] The first problem in some cases has been the determination of the date as of which the cost of manufacture should be computed. This is particularly important where, in a period of declining costs, the contract term is extended and the cost of manufacture is much lower by the time of the actual breach than it was at the time of the contract. In such a situation some courts have measured the cost as of the time of the breach, on the theory that that would give the seller the profit he would have made if the buyer had given shipping orders at that time.[15] Others have employed the date the contract was made, thus restricting the seller to the profit he would have made if the order had been filled immediately after the signing of the contract.[16] This seems to be too favorable to the buyer since he is permitted to make a large saving by repudiating the contract.

Once the date is decided upon, serious problems as to proof of the cost of manufacture arise. The following quotation from the opinion in the Wisconsin case of *Sheffield-King Milling Co. v. Jacobs*[17] gives an indication of the possible difficulties:

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11. *E.g.*, Miami Cycle Co. v. National Carbon Co., 268 Fed. 46 (6th Cir. 1920); Kingman & Co. v. Western Mfg. Co., 92 Fed. 486 (8th Cir. 1899).

12. Forest Products Co. v. Dant, 117 Ore. 637, 244 Pac. 531 (1926); Ames Body Corp. v. Ralph, 211 Ky. 735, 277 S.W. 1028 (1925).

13. In Anderson v. Pan American Motors Corp., 232 Ill. App. 27 (1924), where the buyer repudiated a contract to buy automobile motors, the trial court found the damages too conjectural and awarded only nominal damages. The appellate court reversed, saying, "A recovery may be had for prospective profits when there are any criteria by which the probable profits can be estimated with reasonable certainty." *Cf.* Home Pattern Co. v. Mertz Co., 86 Conn. 494, 86 Atl. 19 (1913).

14. *E.g.*, Quist v. Zerr, 12 Wash. 2d 21, 120 P.2d 539 (1941); Georgia Power & Light Co. v. Fruit Growers Express Co., 55 Ga. App. 520, 190 S.E. 669 (1937); Jessup & Moore Paper Co. v. Bryant Paper Co., 297 Pa. 483, 147 Atl. 519 (1929).

15. Margaret Mill v. Aycock Hosiery Mills, 20 Tenn. App. 533, 101 S.W.2d 154 (1936); Anderson v. Pan American Motors Corp., 232 Ill. App. 27 (1924).

16. Mackintosh & Sons Co. v. Spinell, 125 Misc. 75, 210 N.Y. Supp. 54 (Sup. Ct. 1925). The sale was of cotton yarn at 93¢ a pound. The cost of manufacture decreased from 85.8¢ to 41.5¢, thus increasing the seller's prospective profit from 7.2¢ to 51.5¢. In a case where the difference is so great the cost as of the date when the contract was extended might be a workable compromise.

17. 170 Wis. 389, 402, 175 N.W. 796, 802 (1920) (upholding a liquidated damages provision where the buyer breached a contract for the sale of flour).

> "The inherent difficulties of proving the actual damages in a case such as this are such as in practical effect to preclude a manufacturer from recovering damages because of the consequent expense and the disorganization of his business. The removal of auditors, accountants, managers, and foremen from the business of a large, highly organized concern during the time necessarily consumed in a trial entails an expense, in excess of recoverable costs, so great as to prevent in many cases any reimbursement to a manufacturer."

In another such case there were hundreds of pages of testimony at the trial as to whether the plaintiff's plant operated at a profit, whether overhead should be included in the cost, and if so, what types of overhead.[18]

In computing seller's lost profit by subtracting cost from selling price, this question of overhead costs has been particularly troublesome. McCormick, supported by the majority of jurisdictions, argues that a proportionate share of the overhead should be included in the cost of manufacture.[19] Pennsylvania and Georgia courts have taken a greatly modified view of this problem in that they have not allocated overhead to cancelled contracts where it could be shown that subsequent to the cancellation there was no appreciable reduction in the manufacturer's overhead.[20] This view appears preferable since an automatic allocation of overhead under such circumstances and the consequent decreasing of profits will prevent full compensation for the seller. If the repudiated contract is removed from the production schedule while the overhead remains the same, the total expense per remaining unit of production will increase and the profit will decrease.[21]

Where the seller has a contract to furnish the buyer with all his requirements of a commodity for a certain period and the buyer cancels during the period to buy from another, it has been held that the seller can recover prospective profits based on the average volume of sales under

18. Anderson v. Pan American Motors Corp., 232 Ill. App. 27 (1924).

19. McCormick, Damages § 173 (1935); Rantoul Co. v. Claremont Paper Co., 196 Fed. 305 (1st Cir. 1912); Willhelm Lubrication Co. v. Brattrud, 197 Minn. 626, 268 N.W. 634 (1936); Worrell & Williams v. Kinnear Mfg. Co., 103 Va. 719, 49 S.E. 988 (1905).

20. Georgia Power & Light Co. v. Fruit Growers Express Co., 55 Ga. App. 520, 190 S.E. 669 (1937) (contract to buy at least 20,000 tons of ice a year only partially performed for two years); Jessup & Moore Paper Co. v. Bryant Paper Co., 297 Pa. 483, 147 Atl. 519 (1929) (contract for manufacture of pulp repudiated after partial performance). *Cf.*, Morrow-Smith Co. v. Cleveland Tractor Co., 296 Pa. 377, 145 Atl. 915 (1929).

21. Assume a $200,000 business with a total cost of manufacture exclusive of overhead of $100,000, total overhead of $50,000, and profit of $50,000. A $40,000 contract is repudiated before completion of manufacture, but the overhead remains the same. If a proportionate share of overhead, $10,000, is included, the cost of manufacture of the cancelled goods is $30,000 and S recovers $10,000 in damages. The overhead is still $50,000, so the total cost of manufacture of the remaining $160,000 worth of goods is $130,000 and S's profit $30,000. This, with the $10,000 damages, gives S only $40,000 instead of the $50,000 he would have received if the contract had not been repudiated or if overhead had not been included in determining the cost of manufacture. For a more thorough analysis of this problem see 78 U. of Pa. L. Rev. 563 (1930).

the contract before the repudiation.[22] This seems to be the most reasonable basis for determination of lost profits in such a situation.

Mitigation When Materials Are Used for Other Goods.—When the seller has on hand at the time of the breach materials with which to perform the contract and subsequently uses these materials in making other goods sold at a profit, it has been held that his damages must be mitigated by the amount of this profit.[23] There is also strong support for the position that, at least where the seller has the capacity to handle more contracts, he has lost his profit on this particular bargain, and whether he has disposed of the materials profitably or not has nothing to do with his damages.[24] This view seems preferable in most cases since it fully compensates the seller and avoids the additional complication of determining the profit on the second sale.[25]

Other Measures of Damages Applied.—In some of the early American cases in which the seller, a manufacturer, is allowed to recover his profit, the statement is made that he can do this only where the goods have no market value, usually because they are specially manufactured for the buyer. If the goods are staple products with a ready market, he can only recover the difference between the contract price and the market value at the time for performance.[26]

These dicta have been followed, with very doubtful results, in some cases where the contracts deal with staples.[27] Where the market value was above the cost of manufacture, it has been held that with such an article the seller must mitigate his damages by manufacturing and selling to a third party.[28] On the other hand, another case applied the market value standard where the market value was much lower than the cost of manufacture, and as a result the seller recovered much more than his

22. Quist v. Zerr, 12 Wash. 2d 21, 120 P.2d 539 (1941) (requirements contract for gasoline); *cf.*, Home Pattern Co. v. Mertz Co., 86 Conn. 494, 86 Atl. 19 (1913) (profit made on similar transactions in past to be considered in estimating prospective profit on cancelled contract for dress patterns).

23. Hinckley v. Pittsburgh Bessemer Steel Co., 121 U.S. 264 (1887) (steel for rails); Johnston v. Pittsburg Marble & Granite Works, 94 S.W.2d 831 (Tex. Civ. App. 1936) (granite for tombstone); Isaacs v. Terry & Tench Co., 125 App. Div. 532, 109 N.Y. Supp. 792 (1908) (steel for beams).

24. Laporte Corp. v. Pennsylvania-Dixie Cement Corp., 164 Md. 642, 165 Atl. 195 (1933) (materials for cement); Cameron v. White, 74 Wis. 425, 43 N.W. 155 (1889) (logs for lumber); Eckenrode v. Chemical Co., 55 Md. 51 (1880) (materials for phosphate).

25. The only exception would be a case such as Baessetti v. Shenango Furnace Co., 122 Minn. 335, 142 N.W. 322 (1913), where the defendant cancelled a contract to purchase *all* the timber on the plaintiff's land and the plaintiff subsequently cut and sold the lumber to others for approximately the same price. Mitigation would appear to be in order here.

26. Hinckley v. Pittsburgh Bessemer Steel Co., 121 U.S. 264 (1887); Todd v. Gamble, 148 N.Y. 382, 42 N.E. 982 (1896).

27. W. R. Grace & Co. v. Nagle, 275 Fed. 343 (2d Cir. 1921) (steel plates); Garfield & Proctor Coal Co. v. New York, N. H. & H. R. Co., 248 Mass. 502, 143 N.E. 312 (1924) (coal); Kincaid v. Price, 18 Colo. App. 73, 70 Pac. 153 (1902) (coal).

28. Kincaid v. Price, *supra* note 27.

prospective profit.[29] Both of these results seem obviously unfair, the first to the seller and the second to the buyer.

The use of the market value standard in case of breach before completion of manufacture seems fair only where the seller has an option either to manufacture or purchase the goods and the market price goes below his cost of manufacture.[30] In such a situation the buyer could not complain since the seller would naturally choose the more profitable alternative. The market value standard would also be fair where the seller was a distributor and was free to shop around for the goods.[31]

It has been held in a few cases that where the buyer repudiates when the goods are partly completed, the seller can recover the contract price less the value of the partially completed goods at the time of the breach.[32] The courts here seem overly liberal to the seller. If he can dispose of the goods for the value they are found to have in their incomplete state, this plus the damages granted will give him the equivalent of the contract price without the expense of completing the goods.[33]

Results When Seller Completes Performance.—As previously stated, the basic idea of the rule of section 64(4) of the Uniform Sales Act is that the seller cannot recover more in damages than he could have proved at the time of the buyer's breach.[34] The ordinary assumption is, therefore, that the seller will cease performance when the buyer cancels. In quite a few cases, however, the seller has continued to manufacture after the breach. Sometimes the only reason for so doing seems to have been the hope that the buyer would change his mind or that he could somehow be held to the bargain.[35] In such cases the courts ordinarily have followed strictly the rule that damages cannot be enhanced, allowing the seller only his anticipated profit plus the loss from costs incurred at breach.

Situations have arisen, however, in which the seller has been allowed to complete manufacture after the buyer's breach. The commissioners who formulated the Uniform Sales Act have said of section 64(4):

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29. Garfield & Proctor Coal Co. v. New York, N. H. & H. R. Co., 248 Mass. 502, 143 N.E. 312 (1924). Instead of his prospective profit of $12,606.58, the seller recovered $24,665.06.

30. Kellog & Sons, Inc. v. Providence Churning Co., 45 R.I. 180, 121 Atl. 123 (1923); *cf.* Fitchburg Yarn Co. v. Hope Webbing Co., 46 R.I. 290, 127 Atl. 148 (1925).

31. Roehm v. Horst, 178 U.S. 1 (1899); Rice v. Schmid, 18 Cal. 2d 382, 115 P.2d 498 (1941).

32. McCall v. Gloucester Lumber Co., 196 N.C. 597, 146 S.E. 579 (1929); Shaenfield v. Hall Safe & Fixture Co., 157 S.W. 462 (Tex. Civ. App. 1913); Tufts v. Lawrence, 77 Tex. 526, 14 S.W. 165 (1890).

33. Assume the contract price to be $100 and S's cost of manufacture $75. B repudiates after S has spent $20 for labor and materials, and S then disposes of the materials for $10. These cases would allow S to recover the contract price less the resale value of the materials or $90. The customary recovery would be $35, the $25 profit plus the $10 loss from labor and materials.

34. See text at note 3 *supra.*

35. Snelling v. Dine, 270 Mass. 501, 170 N.E. 403 (1930); Roland v. Rex Mfg. Co., 49 R.I. 168, 141 Atl. 310 (1928); Home Pattern Co. v. Mertz Co., 86 Conn. 494, 86 Atl. 19 (1913).

"This provision does not require the seller to cease performance in every case. There may be cases where the damage caused by stopping performance would be greater than that caused by finishing the necessary work. . . . In such a case the seller might complete performance, and recover damages based on complete performance." [36]

As an example, the commissioners cite *Southern Cotton Oil Co. v. Heflin.*[37] There the plaintiff was manufacturing oil, meal, cake, hulls and lint out of cotton seed in the same process. The defendant repudiated a contract to buy cake and meal, and it was held that the plaintiff, who continued to manufacture, could recover the difference between the contract price and the market value, the measure of damages if the goods had been completed at the time of the breach.

The Maryland Courts of Appeals allowed the seller to complete the goods and recover under the market value standard where the goods, if left in a partially completed state, would have been worthless.[38] The same measure of damages was applied in a case of repudiation during manufacture in New York, even though the market value was less than the cost of manufacture, where the goods in question were such as the seller might have manufactured for the general purposes of his business.[39] Whether this result was fair to the buyer is not clear since there is no indication in the opinion as to what the total damages would have been if the seller had not completed the goods.

Where the goods are nearly completed at the time of breach and thus there is no "labor or expense of material amount" [40] to be expended, it has been held that section 64(4) does not apply. The seller can complete the goods and recover under the market value standard.[41] In other cases involving goods which were nearly completed and which had no available market value since they were being manufactured specially for the defendant, the seller, in accordance with section 63(3) of the Sales Act,[42] has been permitted to finish manufacture and to recover the price.[43]

36. Commissioners' Note to § 64 in 1A UNIFORM LAWS ANNOTATED (1950).

37. 99 Fed. 339 (5th Cir. 1900).

38. Kahn v. Carl Schoen Silk Corp., 147 Md. 516, 128 Atl. 359 (1925). This was a sale of silk to be woven into various designs and colors. After completion the seller resold at a price above that of the market and damages were determined by subtracting the resale from the contract price.

39. Funt v. Schiffman, 115 Misc. 155, 187 N.Y. Supp. 666 (Sup. Ct. 1921) (goods were coats of regular style).

40. UNIFORM SALES ACT § 64(4).

41. Mattison Machine Works v. Nypenn Furniture Co., 286 Pa. 501, 134 Atl. 459 (1926).

42. "Although the property in the goods has not passed, if they cannot readily be resold for a reasonable price, and if the provisions of section 64(4) are not applicable, the seller may offer to deliver the goods to the buyer, and if the buyer refuses to receive them, may notify the buyer that the goods are thereafter held by the seller as bailee for the buyer. Thereafter the seller may treat the goods as the buyer's and may maintain an action for the price."

43. Lannom Mfg. Co. v. Strauss Co., 235 Iowa 97, 15 N.W.2d 899 (1944) (shoes of special sizes nearly completed); *cf.*, Chicago Lock Co. v. Kirchner, 199 Wis. 30, 225 N.W. 185 (1929) (only 2¢ work left on locks worth 58¢ and price recovered because of guarantee); Soss Mfg. Co. v. Mitchell Motors Co., 119 Misc. 290, 196 N.Y.

EVALUATION OF ADEQUACY OF SELLER'S REMEDIES

There is no doubt that the basic rule allowing recovery of anticipated profits in case of breach before manufacture or procurement is a fair one. If the seller actually recovers the profit he would have made from full performance, plus any loss resulting from labor and material already expended, he has received all he deserves. The real difficulty which ordinarily raises the possibility of loss to the seller is the problem of determining just what his profit would have been.

If the court determines fairly the date as of which the cost of manufacture is to be determined,[44] the seller must next attempt to prove the amount of his cost of manufacture. If his proof is not very definite, the trial court may find his profits too speculative and award him only nominal damages.[45] If this result is avoided, there is still the troublesome problem as to whether the overhead should be included in the cost of manufacture. As has been indicated, a share of overhead may be included in some cases where all or a part of it should be omitted.[46]

In some jurisdictions the seller also is faced with the possibility that the court will apply the wrong measure of damages. This, as demonstrated, may prove a benefit to him, but it also may cause him a sizeable loss.[47]

The seller who is a manufacturer faces a particularly perplexing problem where the buyer repudiates when the goods are partially completed. Should he finish the goods and try either to resell or sue for the price, or should he stop work and sue for lost profits? If he finishes and is able to resell at a favorable price, he has recovered all or most of his loss, and if not all, the court will probably grant damages based on the difference between the contract and resale prices.[48] If, however, he is not able to sell the goods, he has increased his expenses greatly and, unless the goods were nearly completed at the time of repudiation,[49] he will ordinarily recover only the damages due him at breach.[50]

Supp. 304 (1922) (door hinges nearly finished and property held to have passed to buyer through assent of agent). In a borderline case, Buchman v. Millville Mfg. Co., 17 F.2d 983 (2d Cir. 1927), a manufacturer of yarn finished the goods after repudiation when three-fourths complete, although there was no real market for the yarn. Judge Learned Hand weighed the factors on both sides, decided the seller had made a reasonable business judgment in completing manufacture, and granted him recovery of the price under § 63(3).

44. See notes 15 and 16 *supra* and text.

45. See note 13 *supra.*

46. See notes 19 and 20 *supra* and text.

47. See notes 28 and 29 *supra* and text.

48. This was done in Kahn v. Carl Schoen Silk Corp., 147 Md. 516, 128 Atl. 359 (1925).

49. See note 43 *supra* and text at notes 40 to 43. It is doubtful if most courts under similar facts would grant the seller as liberal a remedy as that in the *Buchman* case.

50. See note 35 *supra* and text.

It has been maintained persuasively that even if the seller completes manufacture and is allowed to recover on the basis of his resale price, he is not fully compensated if the resale price is higher than his cost of manufacture.[51] Since he has had to make a second sale, he has diminished the number of prospective customers by one and has really lost his profit on the first sale, not just the difference between the contract and resale prices.[52] Although theoretically sound, the difficulty in enforcing this basis for damages is that it would increase the number of cases in which there would have to be a determination, with all its attendant difficulties, of the seller's profit. Nevertheless, it is true that the manufacturer in this situation is not fully compensated for the loss caused by the buyer's breach, and a seller should be allowed to recover his lost profit if he is willing and able to prove the amount.

Possibility of Aid for Seller Through Contract Provisions

It is evident from a consideration of the foregoing problems and possible inequities that the seller in a case of breach before manufacture has a legitimate interest in trying to make his remedy certain. It might be helpful, therefore, to investigate the possibilities of aid for the seller through provisions of his contract with the buyer. Two types of clauses have been employed to some extent, those providing in effect that the contract cannot be cancelled and liquidated damage clauses.

Clauses Against Cancellation.—Of these the more common in contracts for most types of manufacture have been the clauses against cancellation. Such a provision, if given full effect by the court, simply means that despite the buyer's repudiation, the seller can ship the goods and recover the price. The buyer has thus waived his implied right to breach and answer in damages.[53]

As to the validity of this clause, the sections of the Sales Act are in conflict. Section 71 provides:

> "Where any right, duty or liability would arise under a contract to sell or a sale by implication of law, it may be negatived or varied by express agreement."

Under section 19(4)(1), however, the buyer must assent to the appropriation of goods to the contract, before the passage of title and resultant

51. 2 Williston, Sales § 583a (2d ed. 1924); Comment, 57 Yale L.J. 1360, 1371 *et seq.* (1948). See cases cited note 24 *supra.*

52. Suppose S manufactures an article for $40 and contracts to sell it to B for $60. If this contract is performed and S also makes a subsequent sale of the same product to T for $50, S has made $30. If, however, B repudiates and then S sells to the second customer for $50, his damages are held to be the difference between the contract and resale prices or $10, giving S a total of $20 profit. Thus, unless S could sell the full capacity of his plant despite this loss of a customer, he has really lost $10.

53. Holmes, *The Path of the Law,* 10 Harv. L. Rev. 457, 462 (1897).

liability of the buyer occurs.[54] Also the provision of section 64(4) against enhancement of damages is opposed to a denial of the right of repudiation.[55] The issue is basically, therefore, whether the desirability of certainty of damages and the policy in favor of allowing contracting parties to set their own terms should override the orthodox doctrines of title and mitigation of damages.

A review of the cases which have considered such clauses shows that the reaction of the courts has varied with the relative definiteness and clearness of purpose of the clauses. When it is stated simply that the contract "is not subject to cancellation," a common provision in many order forms,[56] the courts ordinarily have either ignored the clause completely;[57] have interpreted it as meaning merely that the buyer could not cancel the contract without being liable in damages;[58] or, while interpreting it as a promise not to countermand, have denied it effect.[59]

When, however, the intention that the contract should not be cancelled and the consequences of an attempt to cancel are spelled out more clearly, the tendency of the courts has been to give effect to the clause. The least detailed clause found to which some effect has been given was used in the Pennsylvania case of *Mattison Machine Works v. Nypenn Furniture Company*.[60] There it was held that an attempted repudiation by the buyer before completion was not effective because of the clause, "It is *expressly agreed* that this order shall not be countermanded."[61] The seller was allowed to complete manufacture and recover the difference between the contract and resale prices. This was not, however, the only ground of the decision, since the goods were nearly completed at the time of the repudiation, and therefore, the court held that section 64(4) did not apply.[62]

In New Jersey, the Court of Errors and Appeals allowed the seller to recover the price in an ordinary contract of sale because of the clause:

54. "Where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, property in the goods thereupon passes to the buyer."

55. See note 3 *supra*.

56. See acknowledgment of order printed in Stolteben v. General Foods Corp., 79 F. Supp. 228, 233 (S.D.N.Y. 1948).

57. Stolteben v. General Foods Corp., *supra* note 56.

58. Shaenfield v. Hall Safe & Fixture Co., 157 S.W. 462 (Tex. Civ. App. 1913) (no right to breach in absence of clause and breach had same effect with it as without it); *but cf.*, Lewis v. Scoville, 94 Conn. 79, 108 Atl. 501 (1919) (seller allowed to recover price but apparently on basis of English rule that seller is not restricted to damages unless he acquiesces in repudiation).

59. Knight & Bostwick v. Moore, 203 Wis. 540, 234 N.W. 902 (1931).

60. 286 Pa. 501, 134 Atl. 459 (1926).

61. *Id.* at 503, 134 Atl. at 459; *see* Green & Sons v. Lineville Drug Co., 167 Ala. 372 (1910); *cf.* Hauer v. Martin, 284 Pa. 407, 131 Atl. 187 (1925) (contract for personal services).

62. See notes 40 and 41 *supra* and text.

> "Upon refusal or neglect of the vendee to accept the property when tendered by the vendor or its agent the full amount unpaid hereon shall become due and payable forthwith." [63]

A more detailed clause was employed by the seller, a manufacturer, in a Wisconsin case: [64]

> "If the purchaser shall instruct the company not to ship the material, the company may at its option either hold the goods for the purchaser or deliver the material to a common carrier consigned to the purchaser, and either action on the part of the company shall be considered as full performance of the contract by the employer."

Even though the buyer notified the seller of cancellation a month before shipment, the seller was allowed to recover the price. The court held that the provision was a waiver under section 71 of the Sales Act of the buyer's implied right in section 64(4) to cancel the contract.[65]

In another case, *Jonesboro Compress Co. v. Mente & Co.*,[66] a clause provided that if the buyer did not give shipping instructions within a certain time, the seller could recover the price while keeping possession of and title to the goods until he had received payment. The buyer gave no shipping orders and the court enforced the clause to the letter, giving the seller the price without the necessity of giving up the goods until payment was received.[67] This result prevents the increase of expense and loss of seller's lien which may result if seller ships, and appears to be in line with section 56(2) of the Sales Act, which provides, "The unpaid seller of goods, having a lien thereon, does not lose his lien by reason only that he has obtained judgment or decree for the price of the goods."

The conclusion seems to be that where the clause is clear and definite, many courts will enforce a provision that if the buyer attempts to cancel, the seller may recover the price of the goods if he ships or is prepared to ship the goods.[68] The courts do not ordinarily discuss the doctrines of title and mitigation of damages, but stress the importance of allowing the

63. Wales Adding Machine Co. v. Huver, 98 N.J.L. 910, 911, 121 Atl. 621, 622 (1923); *cf.* Owen-Fields, Inc. v. Sudow, 67 S. Dak. 297, 292 N.W. 110 (1940).

64. Renne v. Volk, 188 Wis. 508, 510, 205 N.W. 385, 385 (1925).

65. The subsequent Wisconsin case of *Knight & Bostwick v. Moore* reached the opposite result without mentioning *Renne v. Volk*, but it is possible to distinguish the cases on the basis of the great difference in the clauses used. See note 59 *supra* and text.

66. 72 F.2d 3 (8th Cir. 1934).

67. The same clause was held invalid in Mente & Co. v. Fresno Compress & Warehouse Co., 113 Cal. App. 325, 298 Pac. 126 (1931), under statutory provisions that a contract fixing the amount to be recovered in case of breach is void unless it is extremely difficult to fix the damages. The court seemed to be under the mistaken impression that the clause granted the seller both recovery of the price and permanent possession of the goods.

68. See Llewellyn, *Through Title to Contract*, 15 N.Y.U.L.Q. REV. 159, 199 (1938). The author suggests the use of the following provision: "The price under this contract is agreed to be due at the expiration of the agreed credit term, calculated from the date when seller ships or offers to ship the goods; but should the buyer mail or otherwise communicate his intention to break the contract, the seller may cancel the credit term and declare the price due at once."

parties to set their own terms, particularly since the aim is the desirable one of full performance.[69]

No case has been found in which, under a manufacturing contract containing such a provision, the buyer repudiated *before* manufacture and the seller tried to recover the *price* after completing the goods. It is probable that many courts, otherwise favorable to no-cancellation clauses, would, under these circumstances, restrict the seller's recovery to his anticipated profit. Such a clause, however, assuming the goods contracted for to be staples with a ready market, might well be effective to allow the seller to manufacture, resell to a third party, and recover the difference between the contract and resale prices. The immediate resale would avoid the possibility of high storage charges accumulating during litigation in an action for the price, charges which would increase either the damages paid by the buyer or the seller's loss, depending on who won the case.

It would seem then that one of the seller's best chances to increase the certainty of his damages would be through a clearly worded provision that after repudiation by the buyer, the seller may complete manufacture, if this will not unreasonably increase the damages, declare the price due, and sell the goods for the buyer's account, recovering from the buyer the difference between the contract and resale prices. Furthermore, if the seller is not operating at full capacity and is willing to bear the burden of proof as to cost of manufacture, he may provide that in cases where the resale price is more than the seller's cost of manufacture, his recovery would be the lost profit on the original sale. Only by this recovery would he be fully compensated for the loss incident to the breach.[70]

Liquidated Damage Provisions.[71]—Liquidated damage clauses in contracts to manufacture have been employed much less generally than those prohibiting cancellation. They have, however, been used extensively in the flour industry. This is primarily due to the fact that many flour manufacturers use the standard "Millers' National Federation Uniform Sales Contract," which includes in it a liquidated damages provision.[72] This clause does not stipulate a lump sum as damages, but provides a method of computation based upon the expense of holding the wheat, the cost of selling, and the difference between the purchase and resale prices

69. "The primary idea or purpose of a present valid executory contract is future full performance by all parties to it. That being the real reason for its existence, we see no good grounds upon which we could hold that parties may not contract in advance that they will not assert or maintain certain conditions which, in the absence of provisions to the contrary, have been and are recognized as incident to executory contracts. If one may waive substantial rights such as are guaranteed to him by the Constitution, we can see no logical reason for saying that he may not . . . waive that which is a mere condition attached by statute or rule of law to a contract which is itself silent on the subject." Renne v. Volk, 188 Wis. 508, 510, 205 N.W. 385, 386 (1925).

70. See notes 51 and 52 *supra* and text.

71. The Uniform Sales Act has no provision regarding liquidated damages.

72. See Rice v. Schmid, 18 Cal. 2d 382, 115 P.2d 498, 500 (1941).

of the wheat.[73] This clause and ones very similar to it have been upheld as valid in whole or in part in many jurisdictions.[74]

The assumption in the flour cases is that the seller will purchase wheat shortly after the contract is made, and will carry it until the flour is manufactured when the buyer furnishes shipping instructions.[75] The fact that the price of wheat fluctuates greatly has been stressed, therefore, as a cause of uncertainty in the seller's damages and a reason for validating the above provision.[76] In supporting the same clause, in more general terms, another court stated:

> "There is a distinct trend toward a relaxation of the rules as to liquidated damages. . . . In the complexities of modern business, breaches of contract involve more incidental but real damages than when business was less complicated; in later years, business men and associations of business men have been more desirous of contracting as to damage, in order that their liability may be a known rather than an unknown quantity. Responding to these changing conditions in the business world, the courts have been much less reluctant than formerly to enforce provisions for liquidated damages." [77]

It has been said, and it would seem properly so, that the liquidated damage provision could not be applied if the buyer repudiated before the seller had incurred the expense of purchasing wheat for the contract.[78] It has also been held that liquidated damages will not be granted where the seller is a distributor, since the amount of damages can be easily determined.[79]

Few cases have been found outside of the flour industry in which contracts to manufacture contained provisions for liquidated damages. In one of these the court allowed the seller to recover under a clause which provided for damages of twenty per cent of the contract price if the buyer

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73. If the buyer fails to furnish shipping instructions, the seller may recover: (1) ⅓¢ per day per barrel of flour from the date of the sale to the date of termination as carrying expense; (2) 20¢ per barrel as the cost of selling; (3) plus or minus the difference between the market value of a bushel of wheat on the date of sale and on the date of termination, multiplied by 4.6 times the number of barrels of flour, 4.6 being the amount of wheat needed to make one barrel of flour. The provision is quoted in full in Quaile & Co. v. Kelly Milling Co., 184 Ark. 717, 43 S.W.2d 369 (1931) (denying recovery of the cost of selling but allowing other two grounds).

74. *E.g.*, Christian Mills v. Berthold Stern Flour Co., 247 Ill. App. (1927); Yerxa v. Domestic Science Baking Co., 95 Ohio St. 180, 115 N.E. 1014 (1917) (2¢ a bushel for loss of profit added, but lower rate on other items). Such clauses have also been held valid in Alabama, Indiana, Michigan, Nebraska, South Dakota, and Wisconsin.

75. Quaile & Co. v. Kelly Milling Co., 184 Ark. 717, 43 S.W.2d 369 (1931); Sheffield-King Milling Co. v. Domestic Science Baking Co., 170 Wis. 389, 175 N.W. 796 (1920).

76. Cases cited note 75 *supra.*

77. Larabee Flour Mills Co. v. Carignano, 49 F.2d 796 (10th Cir. 1931).

78. *See* Quaile & Co. v. Kelly Milling Co., 184 Ark. 717, 724, 43 S.W.2d 369 (1931).

79. Rice v. Schmid, 18 Cal. 2d 382, 115 P.2d 498 (1941). *Contra:* Hosmer Co. v. Paramount Cone Co., 285 Mass. 278, 189 N.E. 192 (1934).

countermanded the whole order.[80] There was, however, no discussion in the opinion as to the fairness of the damages granted.

In two other cases the seller was to recover a certain percentage of the contract price if the buyer cancelled all *or any part* of the order.[81] The courts in both instances held the provisions to be penalties, since the same sum would be received whether the part of the order repudiated was large or small. The amount recoverable under the clause was, as a matter of fact, substantially less in one of the cases than the damages actually suffered, and the court held that the seller could recover his actual damages.[82]

The rationale of the courts in these cases seems obviously correct as to clauses in which a lump sum is to be recovered as damages whether the breach is total or partial. If the sum is to be recovered only in case of total breach, the liquidated damages clause should still be invalid if the seller cannot resell for any substantial amount because the goods are being made to buyer's peculiar specifications. In such a case the seller's damages would vary so much, depending on the stage of production at the time of repudiation, that any single sum would rarely be a fair liquidation of damages. There would appear to be no legal objection, however, to a provision that the seller should recover a certain percentage of the contract price approximating the profit he ordinarily obtains on such a sale, and that the remaining damages, resulting from expenditures incurred prior to the breach, should be computed in the usual way.

Where the order is for staple goods with a ready market, the agreement could combine elements of both no-cancellation and liquidated damage clauses, providing that upon repudiation seller may complete the goods, resell, and then recover a percentage of the contract price as his lost profit.[83] It is possible also that reasonable formulas such as that employed in the flour industry might be evolved in other types of manufacture to give a more exact approximation of the seller's lost profit in such cases. In determining the exact method to be used in arriving at the seller's anticipated profit, it should be borne in mind that such agreements may later be scrutinized by the courts. Consequently, sufficient detail should be incorporated within the agreement to preclude a court determination that the clause was a penalty provision.

Prospects Under the Uniform Commercial Code

Some of the inadequacies of present sales law in the field of seller's damages are recognized in the proposed Uniform Commercial Code. The

80. Tidwell v. Southern Engine & Boiler Works, 87 Ark. 52, 112 S.W. 152 (1908).

81. Mansur & Tebbetts Implement Co. v. Tissier Arms & Hardware Co., 136 Ala. 597, 33 So. 818 (1902) (forty-seven carriages, buggies and phaetons); Palestine Ice, Fuel & Gin Co. v. Connally & Co., 148 S.W. 1109 (Tex. Civ. App. 1912) (a ginning machine with many parts).

82. Palestine Ice, Fuel & Gin Co. v. Connally & Co., *supra* note 81.

83. Such a provision, if enforced, would fully compensate the seller by giving him the profit on both sales without the problems of proof in court. See text at notes 52 and 70.

first change to be noted is the relaxation of the requirement of mitigation of damages where the buyer breaches before the completion of procurement or manufacture. If in the seller's "reasonable commercial judgment," the completion will not *"materially* increase the damages," he may complete the goods and appropriate them to the contract.[84]

This is in line with the Code's increased stress on the importance of resale by the seller to make his damages certain. Under the Uniform Sales Act the resale price was considered to be merely evidence of the market value,[85] but the new act definitely provides:

> "Where the resale is made in good faith and with reasonable care and judgment the seller may recover the difference between the resale price and the contract price." [86]

This means that the manufacturer of goods, which could be resold for a price approximately as high as his probable cost of manufacture, could complete the goods and recover the difference between the contract and resale prices. This would avoid the difficulties of proving his cost of manufacture in court.[87]

The Code is silent as to the seller's measure of damages if he chooses not to complete the goods, but it is assumed that the courts would continue to award him his lost profit.

As to the efficacy of no-cancellation and liquidated damage clauses under the Uniform Code, the principles for dealing with them are spelled out more clearly than in the Uniform Sales Act, but it is doubtful if such clarifications will result in any significant change in the decisions. The Code provides that the court may strike any unconscionable clause and enforce the rest of the contract, but the decision as to what is unconscionable is a matter of the court's discretion.[88] A section on liquidation of damages is added which is merely a statement of the existing law:

> "Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty." [89]

CONCLUSION

It is evident then that there will continue to be difficulties as to the granting of a fair recovery to the seller when the buyer repudiates before

84. UNIFORM COMMERCIAL CODE § 2-302 (May 1949 Draft).
85. 2 WILLISTON, SALES § 550 (2d ed. 1924).
86. UNIFORM COMMERCIAL CODE § 2-706. (May 1949 Draft).
87. The objection that the manufacturer has lost a sale and should really recover his profit in this situation is valid under the Code also, but assuming no liquidated damage clause, this weakness seems inevitable if certainty of damages is to be had.
88. UNIFORM COMMERCIAL CODE § 2-302 (May 1949 Draft).
89. *Id.* § 2-720.

the completion of manufacture. The recovery of lost profit, as provided by the Uniform Sales Act, appears equitable, but problems as to determination of that profit will still arise. Also, there will always be a danger of the misapplication of remedy. The Uniform Commercial Code attempts to meet these problems by its stress on certainty of damages in allowing the seller greater freedom to complete and resell the goods. It is believed that widespread adoption of the Code, combined with more frequent use of reasonable no-cancellation and liquidated damage provisions of the types suggested in this Note, will go far toward eliminating many of the inequities and uncertainties currently existing in the determination of seller's damages in cases of repudiation before completion.

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